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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 888

UNITED BISCUIT COMPANY OF AMERICA, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING

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March 24, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Pursuant to Rule 58 of this Court's Rules, petitioner asks Rehearing of this Court's order of February 28, 1966, denying its petition for certiorari, limited to petitioner's third point: that the refusal of the Commission to grant a temporary stay of enforcement of its order against United was, under the special circumstances of this case, a patent abuse of discretion which should have been corrected by the Court of Appeals.

The Court of Appeals decision here was entered August 9, 1965. On October 22, 1965, another panel of the same Court of Appeals issued its decision in *Universal-Rundle Corporation* v. *Federal Trade Commission,*

352 F.2d 831 (C.A. 7). As the Commission said in its petition for rehearing to the Court of Appeals in the *Universal-Rundle* case, on the question of a stay of the Commission's order, "The decision conflicts with the decision of another panel of the Court in *United Biscuit Company of America* v. *Federal Trade Commission,* 350 F.2d 615." The Court of Appeals denied rehearing December 17, 1965.

In the Commission's brief in opposition to petitioner's petition for certiorari here the Solicitor General, as to petitioner's point that the decision in this case is in conflict with that of another panel of the same Court in *Universal-Rundle,* said: "Whether or not *Universal-Rundle* was correctly decided, we note that in the present case cease and desist orders have already been entered against United's principal competitors . . ." (pp. 11-12). The orders against United's competitors were, however, subsequently held unenforceable by the Court of Appeals for the Ninth Circuit, on February 16, 1966, in *Federal Trade Commission* v. *Jantzen, Inc.* (see Solicitor General's Supplemental Memorandum here).[1] Thus, on this point, there is now no distinction between this case and *Universal-Rundle.*

The Solicitor General's brief in opposition here stated in a footnote (p. 11): "The Solicitor General has not yet determined whether to file a petition for certiorari in that [*Universal-Rundle*] case." On March 18, 1966, counsel for petitioner here wrote the Solicitor General asking if he intended to file a petition for

[1] The Solicitor General's Supplemental Memorandum avoids stating whether *Jantzen* was correctly decided; the time to petition for certiorari has not yet expired.

certiorari in *Universal-Rundle,* and on the same date the Solicitor General advised petitioner's counsel that, "I have determined to file a petition for a writ of certiorari in the *Universal-Rundle* case" (see Appendix).

Petitioner asks for a rehearing in this case, on its third point, so that if the Court grants certiorari in the *Universal-Rundle* case, it will have jurisdiction to hear both cases, to resolve the conflict in decisions and to administer equal justice.

Respectfully submitted,

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Certification of Counsel

William Simon, counsel for petitioner, does hereby certify that the foregoing petition for rehearing was filed in good faith and not for delay and does further certify that the petition for rehearing is restricted to the grounds specified therein.

WILLIAM SIMON

March 24, 1966

APPENDIX

OFFICE OF THE SOLICITOR GENERAL
WASHINGTON, D. C. 20530

March 18, 1966

William Simon, Esq.
Howrey, Simon, Baker &
Murchison
1707 H Street, N.W.
Washington, D. C. 20006

Dear Mr. Simon:

In response to the inquiry in your letter of March 18, 1966, I have determined to file a petition for a writ of certiorari in the *Universal-Rundle* case.

Sincerely,

THURGOOD MARSHALL
Thurgood Marshall
Solicitor General